UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SHARON ALLEN, et al.,

Plaintiffs,

v.

WESTERN STATE HOSPITAL, et al.,

Defendants.

Case No. C99-5018RJB

ORDER GRANTING THE PLAINTIFFS' APPLICATION FOR ATTORNEYS' FEES AND COSTS

This matter comes before the court on the plaintiffs' Application for Fees And Costs ("Application"). (Dkt. No. 72.) The court has considered the pleadings filed in support of and in opposition to the plaintiffs' Application, and the record herein.

REQUIREMENTS FOR CONSIDERATION AS THE PREVAILING PARTY

A prevailing party, in a federal civil rights action, is entitled to reasonable attorneys' fees and costs. A plaintiff must obtain at least some relief on the merits of his or her claim. *Farrar v. Hobby*, 506 U.S. 103, 111 (1992). "In short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. *Id.* at 111-112. At a minimum, to be considered a prevailing party in a federal civil rights action, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between the plaintiff and the defendant. *Texas State Teachers Asss'n v. Garret Independent School District,* 489 U.S. 782, 792 (1989). Thus, the

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"touchstone" of the prevailing party inquiry must be the material alteration of the legal relationship between the parties. *Id.* at 792-793. Where such a change has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the attorneys' fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983).

A prevailing party is also considered to be one who obtains "comparable relief through . . . settlement." *Farrar,* 506 U.S. at 111. Whatever relief the plaintiff secures must directly benefit him at the time of settlement to permit him to recover "prevailing party" attorney fees under the civil rights statutes. *Id.* at 111. Otherwise the settlement cannot be said to "affect the behavior of the defendant toward the plaintiff." *Id.* (*citation omitted*). Thus, a district court should give primary consideration to the degree of success achieved when it decides whether to award attorneys' fees. *Wilcox v. City of Reno*, 42 F.3d 550, 554 (9th Cir. 1994).

In this case, in their settlement the parties agreed that the "[d]efendants shall reimburse the plaintiffs for attorneys' fees and costs reasonably incurred in this litigation . . . ." (Agreed Ord. at 3:¶ 4.) Therefore, this is a contractual agreement to pay fees and costs, and an analysis of which party prevailed is probably not necessary. Nevertheless, the plaintiffs clearly are the "prevailing parties" within the meaning of 42 U.S.C section 1988(b), 42 U.S.C. section 12205, section 504 of the Rehabilitation Act of 1973 (as amended), and 29 U.S.C. section 794, as well as under the Americans with Disabilities Act ("ADA").

STANDARD FOR ATTORNEY AT FEES

A prevailing party is entitled to "reasonable" attorneys' fees. A reasonable attorney fee, or the "lodestar amount," is calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. *Hensley* 461 U.S. at 434; *McGrath v. County of Nevada*, 67 F.3d 248, 252 (9th Cir. 1995). Furthermore, under 42 U.S.C. section 1988, "'reasonable fees' . . . are to be calculated according to the prevailing market rates in the relevant community, regardless of whether the plaintiff is represented by private or nonprofit counsel." *Blum v. Stenson*, 465 U.S.

886, 895 (1984).

While the lodestar figure is presumed to represent an appropriate fee, under certain circumstances a court may adjust the award upward or downward to take into account special factors. *Davis v. San Francisco,* 976 F.2d 1536, 1541 (9th Cir. 1992) (*citing Blum*, 465 U.S. at 897). Counsel for the prevailing party is obligated to make a good faith effort to exclude all excessive, redundant, and unnecessary hours from the fee request, "just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Hensley*, 461 U.S. at 434. Counsel should exercise "billing judgment," and not seek compensation for hours "that are not properly billed to one's client." *Id.*

In *Davis v. Mason County*, 927 F.2d 1473, 1488-89 (9th Cir. 1991), the Ninth Circuit Court of Appeals affirmed the reasonableness of the district court's award of attorneys' fees which were established by consideration of the "*Kerr*" factors set out in *Kerr v. Screen Extras Guild*, 526 F.2d 67 (9th Cir. 1975). *See also Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996). The *Kerr* factors include (1) the attorney's time required; (2) novelty of the case; (3) the skill required to perform the legal service properly; (4) preclusion of other employment; (5) a customary fee charged in the locality for similar services; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client and/or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the attorney/client relationship; and (12) awards in similar cases.

Washington courts also rely on the Washington Rules of Professional Conduct ("RPC") Rule 1.5(a) to determine the amount of an attorneys' fee award. *Allard v. First Interstate Bank*, 112 Wash. 2d 145, 150 (1989). RPC 1.5(a) lists a number of factors to be considered in determining the reasonableness of a fee:

> (1) The time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly and the terms of the fee agreement between the lawyer and client;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) The fee customarily charged in the locality for similar services;
(4) The amount involved in the matter on which legal services are rendered and the results obtained;
(5) The time limitations imposed by the client or by the circumstances;
(6) The nature and length of the professional relationship with the client;
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) Whether the fee agreement or conforming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

The RPC 1.5(a) factors are sufficiently similar to the Kerr factors as to not require a separate discussion here.

PROCEDURAL BACKGROUND

On January 12, 1999, a "Class Action Civil Rights Complaint" was filed by Washington State Protection Advocacy Systems, Inc. ("WSPAS") a non-profit "protective and advocacy agency for those Washington citizens who have mental, physical and developmental disabilities." (Pls.['] Compl. at 3.) The action was brought to challenge the inadequate conditions of care at Western State Hospital ("WSH"), and in the community for adults with developmental disabilities who have mental health needs. (Pls.['] Mem. in Supp. of Application for Fees & Costs at 1.) The plaintiffs sought declaratory and injunctive relief, asserting that the defendants had denied them minimally adequate treatment, habilitation, behavioral support, protection from harm, and other related care and services at WSH and in the community in violation of the plaintiffs' rights under the First and Fourteenth Amendments.

On April, 23 1999, the court heard oral argument on the issue of class certification. On May 17, 1999, the court entered its Order Certifying Class Action. The plaintiff class was certified "to consist of individuals with developmental disabilities 1) who presently reside at Western State Hospital, 2) who have been discharged from Western State Hospital after June 1, 1997 to residential habilitation centers; or community living arrangements funded, operated or licensed by the

defendants, and 3) who will be admitted to Western State Hospital in the future." (Ord. Certifying Class at 11.)

On December 2, 1999, the parties filed a Joint Motion to Stay Proceedings ("Joint Motion"). The Joint Motion was based on the fact that "[f]ollowing mediation with Judge Arnold, an agreement was reached between the parties to stay further proceedings in the litigation, contingent on [the] defendants' implementation of a three-phase plan for mental health and habilitation services for all class members." (Joint Mot. at 1.) The parties had "reached a conditional settlement" following extensive discovery, (Pls.['] Mem. in Supp. of Application at 1), and moved for entry of an order striking the trial date and staying all further proceedings in the litigation. (Joint Mot. at 1.)

On December 2, 1999, the court entered the Agreed Order on Joint Motion to Stay Proceedings ("Agreed Order"). The Agreed Order was "contingent on the defendants' adherence" to the "terms and conditions" set forth in four (4) sections of the Agreed Order which included a statement that the "[d]efendants shall reimburse the plaintiffs for attorneys' fees and costs reasonably incurred in this litigation within a reasonable period of time." (Agreed Ord. at 3:¶ 4.) The Agreed Order stated that the "parties shall attempt to reach agreement on the amount of attorneys' fees and costs that are reasonable." *Id.* It also stated that "[i]f the parties are unable to reach agreement on the amount of reasonable costs and attorneys' fees, the issue shall be presented to the [c]ourt for decision." *Id.*

On February 10, 2000, the plaintiffs filed "Plaintiffs' Application for Attorneys' Fees and Expenses" ("Application"). Plaintiffs "request . . . fees and costs of $1,161,104.50 ($955,754.40 in fees and $205,350.18 in costs)." (Pls.['] Mem. in Supp. of Application at 2.) Plaintiffs argue that they are entitled to attorneys fees under 42 U.S.C. section 1988 (Civil Rights Attorney's Fee Award Act), "[s]ection 504 of the Rehabilitation Act of 1973 (as amended) . . . .," 29 U.S.C. section 794, and "fees . . . litigation expenses, and costs " under the Americans with Disabilities Act (42 U.S.C §§12101 - 12213). (Pls.['] Mem. at 2.)

On February 29, 2000, the court entered an "Agreed Order to Renote Plaintiffs' Application for Fees and Costs" re-noting the plaintiffs' Application to April 28, 2000. On April 19, 2000, the plaintiffs filed "Plaintiffs' First Supplement to Application for Attorneys' Fees & Costs" ("Supplemental Application"). On April 21, 2000, the court entered an order re-noting plaintiffs' Application for May 5, 2000. Pursuant to federal law, the plaintiffs now seek fees and costs in the amount of $1,185,280.83 ($979,810.90 in fees and $205, 469.93 in costs.) (Decl. of Deborah A. Dorfman of 4/18/00 in Supp. of Pls.['] Supplemental Application 4/18/00 at Ex. F.)

ISSUES

The issues presented by the plaintiffs' Application for Fees and Costs and Supplemental Application are:

1. What is the lodestar amount for the plaintiffs' attorneys' fees? This issue has the following subparts:

   a. Whether the plaintiffs' attorneys' fees in the total amount of $979,810.90 is reasonable as to hours spent and rates charged:

      i. Whether the Washington Protection and Advocacy System attorneys request for an award of $820,285.40 is reasonable as to hours spent and rates charged:

      ii. Whether the law firm of Davis Wright Tremaine's request for an award of $86,457.50 in attorneys' fees is reasonable as to hours spent and rates charged;

      iii. Whether Attorney Robert Denton's request for an award of $28,928.50 in attorney fees is reasonable as to hours spent and rates charged; and

      iv. Whether the plaintiffs' request for a fees-on-fees award in the amount of $44,139.50 is reasonable as to hours spent and rates charged.

2. Whether any adjustments should be made to the lodestar amounts.

3. Whether the plaintiffs' request for costs and expenses of litigation in the amount of $205. 469.93 is reasonable.

DISCUSSION

1. What is the lodestar amount for the plaintiffs' attorneys' fees?

a. Whether the plaintiffs' attorneys' fees in the total amount of $979,810.90 is reasonable as to hours spent and rates charged.

i. Whether the Washington Protection and Advocacy System attorneys request for an award of $820,285.40 is reasonable as to hours spent and rates charged.

Unfortunately, the defendants offer no analysis of the plaintiffs' WPAS attorneys' hours and rates. The defendants argue only that the plaintiffs' modest and minimal gains in this litigation do not warrant attorneys' fees totaling $955,754.50. *See* Defs.['] Resp. at 1. The defendants do not challenge the plaintiffs' Supplemental Application in which the plaintiffs request total fees in the amount of $979,810.90. *See* Decl. of Dorfman of 4/18/00 in Supp. of Pls.['] Supplemental Application at Ex. F. In their response, the defendants contend that, under all the circumstances, the plaintiffs' request is unreasonable, thereby inviting the court to do the careful lodestar analysis required to challenge the plaintiffs' attorneys' showing. The court declines to accept this invitation.

If the defendants do not challenge *specific* hours spent by the plaintiffs' attorneys, or the *specific* rates charged by the plaintiffs' attorneys as unreasonable, the court has no reason to do so. Instead, the court should simply rule on the issues raised by the defendants after approving the basic lodestar amounts based on the number of hours spent and the rates charged. *See infra* § 2.

Plaintiffs' WPAS counsel state that they and their staff expended the following number of hours and claim the following rates as reasonable:[1]

Counsel	Hours	Rate	Fee
Deborah Dorfman	1387.10	$215.00	$298,226.50

[1]WPAS attorney Stacie B. Siebrecht's attorney's fees will be discussed under fees-on-fees. *See infra* subsection iv.

Michael Smith	1167.10	$225.00	$262,597.50
Elizabeth Stanhope	1084.70	$180.00	$195,246.00
David Lord	202.00	$165.00	$ 33,330.00
Staff	**Hours**	**Rate**	**Fee**
Elizabeth Ligon	73.85	$100.00	$ 7,385.00
Laura Allen	36.20	$ 50.00	$ 1,810.00
Marie Jensen	156.88	$ 55.00	$ 8,628.40
Lance Andree	59.65	$ 40.00	$ 2,386.00
Betty Schweiterman	144.00	$ 40.00	$ 5,760.00
Gillian Maguire	95.75	$ 40.00	$ 3,830.00
Magda Baker	27.15	$ 40.00	$ 1,086.00
TOTAL	4434.38		$ 820,285.40

(Decl of Dorfman of 2/9/00 in Supp. of Application at Ex. W.)

In applying the *Kerr* factors to the plaintiffs' WPAS attorneys, the first eleven *Kerr* factors are well and fully discussed by the plaintiffs' in their Memorandum in Support of Plaintiffs' Application for Fees and Costs, and in the declaration of Mark Stroh, Executive Director of Washington Protection and Advocacy System. *See* Pls.['] Mem. in Supp. of Application of at 6-8; *see also* Decl. of Mark. G. Stroh of 2/9/00. The court adopts those discussions as its findings here. In regard to *Kerr* factor Number 12, although plaintiffs offered evidence as to hourly rates, neither side offered evidence of *comparable* awards in similar cases. Indeed, there may be no cases sufficiently similar to allow a fair comparison.

The court has reviewed the accounting of hours spent and rates charged, and found no obvious errors, unreasonable duplication of hours or unreasonable rates charged by the plaintiffs' WPAS attorneys. The plaintiffs' WPAS attorneys lodestar amount is therefore $820,285.40

ii. Whether the law firm of Davis Wright Tremaine's request for an award of $86,457.50

attorneys' fees is reasonable.

The Seattle law firm of Davis Wright Tremaine ("Davis Wright") requests $86,457.50 in attorneys fees for 633.00 billable hours. *See* Decl of John Parnass in Supp.of Application for Attorneys Fees and Costs of 2/9/00 at 2:¶ 4, *see also* Decl. of Parnass of 4/18/00 at 2. "In late August, 1999," John Parnass and Monty Gray, partners at the law firm of Davis Wright, "decided that *Allen v. Western State Hospital* would be an important and appropriate focus for [the] firm's efforts." (Decl. of Parnass of 2/9/00 at 1-2) (*emphasis in original*). Mr. Parnass' "practice focuses on trial work, primarily in the field of construction disputes." *Id.* at 1.

In September 28, 1999, the firm forwarded a Letter of Engagement to Mark Stroh, Executive Director of Washington Protection & Advocacy Society agreeing to provide WPAS pro bono legal assistance to the plaintiff class in this matter. (Decl. of Parnass of 2/9/00 at Ex. B.) Under the subsection entitled "Charges for Legal Services," the Letter of Engagement states that "in the event the plaintiffs in Allen were determined to be the prevailing parties in the action . . . Davis Wright Tremaine LLP would seek to recover its reasonable attorneys fees . . . ." *Id.* (*emphasis in original*).

The billing statements supplied by Davis Wright in support of its attorneys fees provide that Mr. Parnass and the approximately 31 Davis Wright associates that worked on this case expended 721.70 hours for a total of $99,163.00. (Decl. of Parnass of 2/9/00 at Ex. A; Decl. of Parnass of 4/18/00 at 2.)

Mr. Parnass states that the firm has decided to "write off a total of 83.7 hours with a value of $11,829.00," as well as an additional "5 hours with a value of $876.50" for work performed by the attorneys at Davis Wright. (Decl. of Parnass of 2/9/00 at 2; Decl. of Parnass of 4/18/00 at 2.) "The purposes of the write-offs were various." *Id.* These write-offs fall under the following nine categories: (1) "time between August 20, 1999 and September 1, 1999" when Davis Wright was reviewing its acceptance of WPAS request for legal assistance, (2) brief conferences between the law firm's attorneys concerning deposition coordination, the motions for a protective order and

sanctions, (3) inefficient and duplicative hours that were attributed to Mr. Parnass, (4) telephone conferences between Davis Wright lawyers and WPAS representatives regarding deposition coordination, (5) time spent by a Davis Wright lawyer at deposition that did not have significant responsibility for taking or attending the deposition, (6) multiple time entries for conferences where junior associates received legal research instructions from the coordinating lawyer, Michele Earl-Hubbard, (7) time entries which appeared to add no value to the case, (8) time spent working on substantive issues that occurred after a conditional settlement had been reached on November 15, 1999, and (9) matters which assisted in the parties' attempts to expedite the resolution of the fee petition. (Decl. of Parnass of 2/9/00 at 2-3; Decl. of Parnass of 4/18/00 at 2.)

The defendants argue that during the pendency of this action, the plaintiffs "overstaffed the litigation" by hiring Davis Wright to provide litigation services. (Def.['s] Resp. at 8) (*emphasis omitted*). Defendants contend that Davis Wright was hired "in addition to WPAS staff attorneys of Dorfman, Smith, Stanhope, Lord . . . and, later . . . Seibrecht." *Id.* Defendants claim that "approximately 36 attorneys were litigating on behalf of [the] plaintiffs," when the defendants were able to staff the litigation with two full-time attorneys, two attorneys whose primary assignment was the mediation efforts, and one additional Assistant Attorney General who was called upon to attend two depositions. *Id.*

The defendants also argue that the Davis Wright attorneys "were primarily from the commercial litigation section of the firm," and that there is "no showing [that] the attorneys have any experience with disability law." (Def.['s] Resp. at 8.) Moreover, the defendants contend that many of the attorneys from Davis Wright "were of junior status." *Id.* The defendants argue that the Davis Wright "fees and expenses . . . should [be] . . . disallowed as unreasonable" because the "addition of over two dozen attorneys did little to further [the] plaintiffs' goals." *Id.*

The plaintiffs' attorneys counter that they "exercised billing judgment and wrote off time that was duplicative or nonproductive." (Pls.['] Resp. at 5.) The plaintiffs also contend that the

Davis Wright lawyers assigned to the case "were all given discreet tasks, all of which were necessary to the litigation of the case." *Id.* Davis Wright argues that "a conscious decision at the outset [was made] to eliminate any possibility of 'layering' of lawyers . . . ." (Decl. of Parnass of 2/9/00 at 3:¶ 5.) As a result, they argue that "virtually all of the day-to-day responsibility for the case rested on the shoulders of Michele-Earl-Hubbard, a fourth year associate who is one of [their] most capable and efficient attorneys." *Id.*

On application of the *Kerr* factors Numbers 1, 3, 4, 5, 6, 9, 10, 12, and RPC 1.5(a) to the fees for the attorneys from Davis Wright the court finds as follows:

1. The firm has not adequately supported the total time expended by each of the individual attorneys assigned to the case in its billing statement.

3. With the exception of Attorney John Parnass and Michele Earl-Hubbard, Davis Wright has not provided the court with information regarding the skills and expertise of the additional associates assigned to this case.

4. Although this matter was on an expedited trial schedule and Davis Wright's attorneys had a short time with which to prepare for this case, there is no evidence provided by Davis Wright that any of the assigned attorneys were precluded from working on other cases.

5. The plaintiffs Application states that the fees charged by the attorney's at Davis Wright "varies." (Decl. of Dorfman of 2/9/00 at Ex. W.) The Davis Wright billing statements do not clearly state the hourly rates charged by each attorney assigned to this case.

6. The work performed by Davis Wright was performed on a pro bono basis. However, in its Letter of Engagement Mr. Parnass stated that Davis Wright would seek to recover its reasonable attorneys fees if the plaintiffs were deemed the prevailing party in this action.

9. With the exception of Mr. Parnass and Ms. Earl-Hubbard, the experience, reputation, ability and expertise of the Davis Wright attorneys is unknown. Mr. Parnass' practice focuses on trial work, primarily in the field of construction disputes, and Ms. Earl-Hubbard is an associate and

member of Davis Wright's General Litigation and Communications, Media and Information Technologies Departments.

10. Individuals with disabilities have a difficult time accessing qualified legal counsel because of the nature of their disabilities, and it may have been difficult for the WPAS attorneys to succeed without the support of a local law firm with the respect and reputation of Davis Wright.

12. The parties have provided no evidence to the court to compare the request of Davis Wright with awards in similar cases.

Upon review of the records, it appears that there were approximately 37 attorneys working on the case for plaintiffs at different times. Thirty-one of those attorneys are members of the law firm of Davis Wright. Davis Wright has billed 633.00 hours on this case which appears to be excessive.

There is no doubt that Davis Wright assisted the plaintiffs in their efforts in this action, and the legal assistance they provided is admirable. If Davis Wright had not been able to provide the assistance requested by WPAS in this complex class action, it is questionable whether WPAS would have been able to succeed to the extent that it did and may have been forced to seek additional assistance for this complex class action lawsuit. However, the plaintiffs were clearly overstaffed.

The plaintiffs have only provided standard Davis Wright "pro forma" billing statements, but did not provide the court with a detailed statement clearly stating the rates charged by each attorney assigned to this matter. Thus, the record provided by Davis Wright does not provide adequate support for 633.00 billable hours, or $86,457.50 in attorneys' fees. As a result, it is difficult to assess the reasonableness of the hours spent and the rates charged by Davis Wright. Based upon the *Kerr* factors, the Davis Wright lodestar fee request should be reduced by 20% to $69,166.00.

iii. Whether the plaintiffs' Attorney Robert Denton's request for an award of $28, 928.50 in attorney fees is reasonable.

The court, in its discretion, may also include expert fees as part of the attorneys' fees in any

action or proceeding to enforce a provision of 42 U.S.C. § 1981. *See* 42 U.S.C. § 1988(c). The defendants argue that the plaintiffs hired Mr. Denton as an expert, and seek expert fees in the amount of "$28,125.00" for his services. (Def.['s] Resp. at 9.) The defendants attack the use of Mr. Denton's services as unreasonable because plaintiffs' WPAS counsel had experience with disability law, "[t]here is no showing that Mr. Denton was more experienced than local counsel," and he provided "little if any additional expertise." *Id.*

Plaintiffs declare that Mr. Robert Denton, an attorney for the Disability Law Center of Salt Lake City was associated as counsel for this case. *See* Decl. of Elizabeth A. Stanhope of 2/9/00 at 4: ¶ 18. Mr. Denton is an "experienced disability attorney." *See id.*

The defendants have made no showing that the plaintiffs hired Mr. Denton as an expert witness, that Mr. Denton did not serve as co-counsel during this litigation, or that the plaintiffs billed his hourly rates as expert witness fees. Mr. Denton is an attorney with whom the WPAS attorneys associated for his legal expertise, rather than as an expert witness. The court must determine Mr. Denton's lodestar fees as it would any other lawyer.

Mr. Denton's practice focuses on the representation of individuals with developmental disabilities in matters including but not limited to "unnecessary and illegal institutionalization in private and public institutions," the fair housing rights of residents of groups homes, "abuse and neglect of individuals with developmental disabilities and mental illness," community-based mental health services for individuals with dual diagnoses of mental retardation and mental illness, federally funded special education services, vocational rehabilitation and independent living services. (Decl. of Robert Denton of 1/8/00 at 1-2:¶ 2, 3.)

Mr. Denton also has "extensive experience litigating civil rights cases, included three class action cases." *Id.* at 2: ¶¶ 3, 4. Mr. Denton states that his role in the litigation involved assisting in "the formulation of litigation strategy, develop discovery as it related to broader systems development, or the lack thereof, to assist in the development of a final settlement structure and

philosophy, and to participate in negotiations toward settlement." (Decl. of Denton at 3:¶ 7.) Although Mr. Denton declares he is seeking an hourly rate of $225.00 for 125 hours spent representing the plaintiffs and the plaintiffs' class for a total fees award $28,125.00, (Decl. of Denton at 4:¶ 9, 12), there is a discrepancy in the billing statement. The billing statement he has included with his declaration accounts for 123.1 total hours billed. *Id.* at Ex.U. Moreover, the plaintiffs have incorrectly billed him at an hourly rate of $235.00. *See* Decl. of Dorfman at Ex. W. His request, therefore, is actually for $27,697.50.

Plaintiffs' lead counsel, Deborah Dorfman, states that she has "provided representation to individuals in all areas of disability law including special education and assistive technology," (Decl. of Deborah A. Dorfman in Supp. of Application of 2/9/00 at 2:¶ 6.), and has "experience litigating civil rights actions on behalf of individuals with disabilities, particularly for persons with developmental disabilities and mental illnesses in federal and state court." *Id.* at 3: ¶ 7. Moreover, all of the other WPAS attorneys involved in this case (Stanhope, Smith, Lord, and Siebrecht) attest to the fact that their area of specialty is disability law.

Mr. Denton declares that he was responsible for the discovery in this matter as it related to broader systems development, or the lack of systems development. However, Ms. Dorfman also claims that she had "extensive responsibilities during the discovery phase of this case." *Id.* at 4:¶ 15. She states that she was "extensively involved in the settlement negotiations in this case, and "spent time preparing proposed settlement documents, preparing for and participating in three mediation sessions." *Id.* at 6: ¶ 23. Mr. Lord also declares that his primary focus in this case has been in the settlement phase. (Decl. of David Lord in Supp. of Application of 2/9/00 at 2-3:¶ 12.) He also participated in the mediation and settlement process, and developed settlement drafts. *See id* at 3.

It is a lawyer's choice to retain legal counsel who are expert in specialized areas of the law. However, the plaintiffs have failed to adequately justify Mr. Denton's responsibilities or the apparent duplication of effort during the discovery and settlement phases of this case. Yet, the

defendants have also not sufficiently shown that Mr. Denton's expertise did not assist this litigation, promote settlement, and that all of his time was unreasonably spent. Because of the apparent duplication of effort, his lodestar fee request should be reduced by 20% to $22,158.00.

iv. Whether the plaintiffs' WPAS attorneys' request for a fees-on-fees award in the amount of $44,139.50. is reasonable.

The work performed by counsel on a motion for attorney fees under civil rights statutes are compensable. *McGrath v. County of Nevada*, 67 F.3d 248, 253 (9th Cir. 1995). The *Hensley* principles for recovering attorney's fees apply to requests for fees incurred while litigating fees for underlying merits of action. *Thompsen v. Gomez*, 45 F.3d 1365 (9th Cir. 1995). In *Hensley*, the Supreme Court held that a fee award may be reduced to make it reasonable in relation to the success achieved. *See Hensley*, 461 U.S. 424. Thus, the court may consider the degree of success in the lawsuit when reviewing an attorney's request for the fees incurred while doing work on fees-on-fees incurred while litigating the underlying merits of the fees charged. *Id.* at 436. *Thompsen,* 45 F.3d at 1367.

The plaintiffs' Supplemental Application states that they seek a total award in the amount of $24,056.50 for fees-on-fees. *See* Decl. of Dorfman in Supp. of Pls.['] Supplement to Application at 4:¶ 19. Of that total, $4,796.50 is attributed to attorneys for Davis Wright which the court has discussed above, and which was considered in reaching the Davis Wright lodestar. *See supra.* Therefore, that $4,796.50 should be deducted from the fees-on-fees request in consideration of this section. WPAS counsel also seek an award of $24,879.50 for 146.35 hours expended by attorney Stacie Siebrecht in preparation of their Application for Attorneys Fees and Costs which is also a fees-on-fees request. (Decl. of Stacie B. Siebrecht of 2/9/00; Decl of Dorfman of 2/9/00 in Supp. of Application at Ex. W.) Therefore, the total request for this work is $44,139.50 ($24,056.50 + $24,879.50 - $4,796.50).

In the Plaintiffs' First Supplement to Application for Attorneys' Fees and Costs

("Supplemental Application"), the plaintiffs seek $8,381.00 for 49.30 hours expended by Ms. Siebrecht on preparation of the Application which is part of the $44,139.50 total. *See* Decl. of Siebrecht of 4/17/00. The defendants have not specifically challenged the plaintiffs' Supplemental Application or Ms. Siebrecht's declaration. Thus, the court will only address plaintiffs' original request for an award of $24, 879.50 in attorneys fees for Ms. Siebrecht's fees-on-fees work.

Plaintiffs' counsel argue that Ms. Siebrecht's 146.35 hours were necessary in order to "excrcise[] reasonable billing judgment." (Decl. of Siebrecht of 2/9/00 at 3:¶ 9.). Ms. Siebrecht, an attorney for WPAS declares that she "engaged in a thorough process . . . of review" which required many steps. *Id.* She states that she or one of the WPAS legal interns, under her supervision, reviewed every WPAS attorney's as well as the individual WPAS staff's time itemization searching for clarity of descriptions and whether the type of activity was billable. *Id.* Time itemization comparisons were made "to ensure . . . no duplication of services and there was internal consistency in billing for meetings." *Id.* at 3: ¶ 10. However, in application of the first *Kerr* factor, the court finds that although Ms. Siebrecht's rates are reasonable, the 146.35 hours in reviewing billing statements already calculated and submitted by the WPAS attorneys and staff is unreasonable and excessive. Eighty hours - two full workweeks - should have been sufficient to accomplish this work. Ms. Siebrecht's original 146.35 hours claimed should be reduced to 80 hours, and her reasonable fees are therefore $13,600.00 for this work. This is a reduction of $11,279.50 from the amount claimed.

The defendants only challenge $13,194.50 of the total request for $44,139.50 in fees-on-fees, and 69.1 hours spent by the attorneys and an individual staff member for WPAS. *See* Decl. of Kathleen Bilhimer of 4/25/00 in Supp. of Defs.['] Opp'n at 1:¶ 3; *see also* Ex. A. The defendants contend that $13,194.50 for the 69.1 hours the WPAS attorneys and staff spent preparing their records and assessing their time on this case is "facially excessive." (Defs.['] Resp. at. 9.) The defendants argue that the plaintiffs' fees-on-fees request should be "disallowed as excessive, or in

the alternative, reduced by fifty percent." *Id.*

The court has reviewed the Plaintiffs' Application, Supplemental Application, the declarations of Ms. Bilhimer, the WPAS attorneys, and the WPAS staff who worked on this case. This was a complex class action in which the plaintiffs prevailed on significant issues in the litigation and have obtained most if not all of the relief they sought. The plaintiffs obtained a settlement which vindicates the rights of adults with developmental disabilities. The 69.1 hours the defendants argue that the plaintiffs' WPAS attorneys and staff spent on assessing their fees in this litigation are well documented and reasonable. The plaintiffs' WPAS attorneys should be awarded a lodestar amount of $32, 860.00 for fees-on-fees. That figure represents the total claimed of $44,139.50 less the reduction in Ms. Siebrecht's hours of $11,279.50.

The plaintiffs' total lodestar amount is $944,469.40, which represents $820,285.40 (WPAS) + $69,166.00 (Davis Wright) + $22,158.00 (Mr. Denton) + $32,860.00 (fees-on-fees).

2. Whether any adjustments should be made to the lodestar amount.

The court has calculated the lodestar amount to be $944,469.40. In determining a reasonable amount of attorneys' fees in a federal civil rights case, the court may consider such factors as the plaintiffs' degree of success in obtaining relief in the case as well as the *Kerr* factors in adjusting the lodestar amount. *See Friend v. Koldozieczak*, 72 F.3d 1386, 1389 (9th Cir. 1995) (holding that in determining the amount of attorneys' fees award under Civil Rights Attorney's Fees Award Act, the court generally should begin by calculating the lodestar but may also consider other factors, including the degree of success, and may make adjustments to the lodestar accordingly).

The plaintiffs argue that their lawsuit was a "catalyst and framework for statewide change in services and supports for individuals with developmental disabilities who have mental health needs." (Pls.['] Mem. at 4.) The conditional settlement includes the defendants development of a workgroup charged with a three phase state-wide Collaborative Work Plan ("Plan") to address the issues raised in the plaintiffs' lawsuit. *See* Agreed Ord. at Attach.1; *see also* Pls.['] Mem. at 3. The

three phases of the Plan include: (Phase 1) Improving Current Services and Building Collaboration, (Phase 2) Building a Community Infrastructure, and (Phase 3) a Specialized Stabilization Program for Individual's With Developmental Disabilities. *See* Agreed Ord. at Attach. 1.

The issues regarding support and services for the class members has been "brought to a new level of priority" due to the plaintiffs' actions. *See* Pls.['] Mem. at 3. As a result of the conditional settlement, the plaintiffs succeeded in getting the defendants to secure funding for the implementation of the first phases of the Plan with enhancements to address the conditions of care for all class members at Western State Hospital ("WSH"). *See* Agreed Order at 2. The defendants agreed to seek multi-million dollar funding from the state legislature to implement Phases 2 and 3 of the Plan, and to provide oversight for the implementation of the Plan by a monitoring committee of outside experts which also include the plaintiffs' own experts. *See id.*

The plaintiffs also succeeded in including individuals with developmental disabilities, statewide, who have mental health needs. As a result, individuals who are not class members but who are similarly situated, throughout the State of Washington, will benefit from the terms of the settlement. *See* Pls.['] Mem. at 4.

The defendants argue that the plaintiffs' made "modest and minimal gains in this litigation," and urge a 50% across the board reduction from the lodestar on that basis. (Defs.['] Mem. in Opp'n at 1-2.) It is not possible to determine what changes, if any, the State would have made if not faced with this litigation conducted by well-prepared, able, and aggressive counsel. However, the record shows that the parties' settlement has materially altered the defendants' behavior in a way that directly benefits both class members and similarly situated individuals who are not members of the class. The plaintiffs prevailed on significant issues in the litigation and have obtained most, if not all, of the relief they sought. The plaintiffs in the instant case have achieved far more than a de minimis victory. This was a massive and complex class action with an excellent - - and multi-million dollar - - settlement reached for the benefit of the developmentally disabled, and for the

benefit of all the citizens of the State of Washington. The plaintiffs are entitled to the full lodestar amount, without reduction.

3. Whether the plaintiffs' request for costs and expenses in the amount of $205, 469.93 is reasonable.

Pursuant to 28 U.S.C. section 1920, 29 U.S.C. section 1988, 29 U.S.C.794a(b), and 42 U.S.C. section 12205 plaintiffs seek allowable costs and expenses of litigation including court fees, expert fees, and out-of pocket expenses. *See* Pls.['] Mem. at 10-12. The defendants do not contest the reasonableness of the plaintiffs' court costs or out-of-pocket expenses. *See* Defs.['] Opp'n at 1-10.

However, the defendants do attack the plaintiffs' request for expert witness fees, and contend that the plaintiffs' expert witness fees are not recoverable as part of the costs and expenses of litigation. *See* Defs.['] Opp'n at 10. The defendants argue that expert witness fees are not allowed under the ADA, and that given the "nature of the Agreed Order and its implementation, [this] is . . . a civil rights case, as opposed to [a case brought under] the ADA." (Defs.['] Opp'n at 10.) This argument is not persuasive.

Under actions brought under the ADA, Congress intended that the attorneys' fee provision be interpreted in a manner consistent with the Civil Rights Attorney's Fees Act . . . ." (Dkt. No. 73: Pls.['] Mem. at Ex. CC: Judiciary Comm. Report, H.R. Rep. No. 485, 101st Cong., 2d Sess. p.3 at 73: §505 Attorneys Fees; Pls.['] Reply at 6-7.) Thus, "[l]itigation expenses include the cost of expert witnesses," and are allowable under both the ADA and the Civil Rights Attorney's Fee Act. *Id.* Therefore, the plaintiffs' expert witness fees are compensable.

Given that this case was a complex class action involving the legal claims of 150 class members with developmental disabilities, involved numerous federal and state constitutional claims against the defendants for violations of the plaintiffs' civil rights, was fact intensive, involved a wide variety of experts specializing in the rights of the disabled, and was on an expedited trial

schedule, the plaintiffs' costs and litigation expenses in the amount of $205, 469.93 are well-supported in the record and are reasonable.

Accordingly, it is hereby

ORDERED:

(1) The plaintiffs' Application for Fees and Costs (Dkt. No. 72), and Plaintiffs' First Supplement to Application for Attorneys' Fees and Costs (Dkt. No. 104) are **GRANTED** as follows:

a. Plaintiffs shall be awarded a total of $944,469.40 in attorneys' fees; and

b. Plaintiffs shall be awarded a total of $205, 469.93 in costs and litigation expenses;

(2) Judgment shall be entered for the plaintiffs in the amount of $1,149,939.33; and

(3) The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record and to any party appearing pro se at said party's last known address.

DATED this 25 day of May, 2000.

ROBERT J. BRYAN
U. S. DISTRICT JUDGE

ec

United States District Court
for the
Western District of Washington
May 25, 2000

* * MAILING CERTIFICATE OF CLERK * *

Re: 3:99-cv-05018

True and correct copies of the attached were mailed by the clerk to the following:

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